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No. 91-987

In the Supreme Court of the United States

OCTOBER TERM, 1991

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
PETITIONERS

v.

JAMES B. BUSEY IV,
ACTING SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the factual findings of a municipal agency are binding on a federal grant-making agency in determining whether the municipal agency has violated the terms of a grant agreement.

2. Whether the Department of Transportation may suspend federal grants to an airport proprietor under the Airport and Airway Development Act, for excluding—on grounds of excessive noise—an air carrier using aircraft less noisy than others permitted access to the airport.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 942 F.2d 1391. The Federal Aviation Administrator's Decision and Final Order of Noncompliance and Default (Pet. App. 28a-57a) and the Administrator's Order on Reconsideration (Pet. App. 101a-115a) are unreported. The decision of the administrative law judge (Pet. App. 58a-96a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1991. The court of appeals denied (Pet. App. 25a-27a) petitioners' motion to file an out

of time petition for rehearing and suggestion for rehearing in banc on November 26, 1991. On November 7, 1991, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including December 19, 1991. The petition was filed on December 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After an adjudicatory proceeding, the Federal Aviation Administration determined that petitioners' refusal to permit respondent Burlington Northern Air Freight, Inc., to operate an air courier and cargo service constituted unjust and unreasonable discrimination, in violation of grant agreements between petitioner San Francisco Airports Commission and FAA. As a remedy, FAA issued a cease and desist order and determined to withhold funding under those grant agreements. On petition for review, the court of appeals affirmed in pertinent respects.

1. The Federal Aviation Act is the basic statutory source of regulatory authority over the national air transportation system. The general purposes of the regulatory scheme are to assure the safety and efficiency of the system, while promoting competitive air passenger and air cargo service, consistent with national defense needs. See also 49 U.S.C. 1651(a) (1976); 49 U.S.C.-App. 1346. Congress granted the Secretary of Transportation, and in turn, the FAA, the authority to regulate the use of the navigable airspace, to issue operation certificates for air carriers and airports, to set safety standards for aircraft and airmen, to regulate aircraft noise and sonic boom, and to regulate air transportation security. 49 U.S.C. App. 1346, 1348, 1356-1357, 1371, 1421, 1423, 1431.

a. *Federal Airport Noise Program.*—With respect to noise regulation, Section 611 of the Federal Aviation Act authorizes the FAA to establish standards for the levels of noise created by airplanes certificated by the FAA pursuant to 49 U.S.C. App. 1423. See 49 U.S.C. App. 1431(b)(2). Under that authority, the FAA has established three successively more stringent noise levels. Aircraft are classified as Stage 1, Stage 2, or Stage 3 according to their ability to meet these criteria. 14 C.F.R. 36.1(f). Three types of aircraft noise are measured: takeoff noise, sideline noise, and approach noise. FAA regulations prescribe a formula for determining whether the results of these measurements enable a particular type of aircraft to qualify. For Stage 2, part of the formula allows takeoff noise to be measured at the point when the aircraft is able to cut back on its thrust, thus reducing the measurable amount of noise. 14 C.F.R. Pt. 36 App. C, § C36.7. The formula also permits a small tradeoff of up to 2 decibels among the results of the three measurements; thus, an aircraft that exceeds the standard for sideline noise, but more than meets the criterion for takeoff noise, may still be qualified if the excess is within the tradeoff limits. 14 C.F.R. Pt. 36 App. C, § C36.5.

In addition to setting noise levels, the FAA promulgated a schedule for reducing the cumulative noise level of aircraft licensed to operate in the United States. The FAA first imposed standards for the design of new aircraft types; in the next step, standards were imposed on the manufacture of all existing types of aircraft; finally, the FAA set deadlines for the compliance of all aircraft actually operated in the United States. In regulations issued in 1976, the FAA required all subsonic aircraft operating as of

January 1, 1985, to meet the criteria for the Stage 2 noise levels. 14 C.F.R. Pt. 91 (1976).[1]

In 1990, Congress built on the existing federal airport noise scheme by enacting comprehensive airport noise legislation. In the Airport Noise and Capacity Act of 1990, Pub. L. No. 101-558, 104 Stat. 1388-379 (to be codified at 49 U.S.C. App. 2151 *et seq.*), Congress established a deadline for the use of Stage 2 aircraft. It also specifically commanded the FAA to adopt regulations concerning the total phaseout of Stage 2 aircraft (49 U.S.C. App. 2152(a)), and imposed new procedural requirements on airport operators seeking to establish limitations on Stage 2 aircraft. 49 U.S.C. App. 2153(c). Airport operators' restrictions on Stage 3 aircraft are subject to the approval of the Secretary of Transportation, which may be granted only if the Secretary makes certain factual findings. 49 U.S.C. App. 2153(d) and (e).

b. *Federal airport funding program.*—The federal program to fund airport improvements has long been the subject of separate legislation. Beginning with the Federal Airport Act of 1946, there has been a continuous funding program. See Act of May 13, 1946, ch. 231, 60 Stat. 170. The Airport and Airway Development Act of 1970 superseded the Federal Airport Act and created the Airport and Airway Trust Fund, which is financed by a variety of aviation taxes. Pub. L. No. 91-258, Tit. II, § 208, 84 Stat. 250. The 1970 legislation in turn was repealed and superseded by the Airport and Airway Improvement Act of 1982. Pub. L. No. 97-248, Tit. V, 96 Stat. 671.

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[1] See *Lineas Aereas Del Caribe, S.A.* v. *DOT*, 791 F.2d 972, 974-975 (D.C. Cir. 1986); *Airmark Corp.* v. *FAA*, 758 F.2d 685, 687 (D.C. Cir. 1985).

The grant program under the 1970 statute and the successor legislation operates in essentially the same manner. The statute contains a formula for apportioning the available funds for each fiscal year among various classes of recipients, including "primary airports," such as that operated by the Commission. 49 U.S.C. App. 2206. In order to receive these funds, a project sponsor, such as the Commission, must submit a grant application pursuant to 49 U.S.C. App. 2208. The statute provides that:

> [n]o project grant application may be approved by the Secretary unless the Secretary is satisfied that—
>
> * * * * *
>
> (E) all project sponsorship requirements prescribed by or under the authority of this chapter have been or will be met.

49 U.S.C. App. 2208(b)(1)(E). The statute further provides that:

> [a]s a condition precedent to approval of an airport development project contained in a project grant application submitted under this chapter, the Secretary shall receive assurances in writing, satisfactory to the Secretary, that—
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> (1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination * * *;
>
> (2) there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public.

49 U.S.C. App. 2210(a).

If satisfied that the grant application meets the statutory requirements, the Secretary may approve the application and offer the grant to the project

sponsor. The statute requires the Secretary to include in the offer, which in turn is incorporated in the grant agreement, such terms and conditions "as the Secretary considers necessary" to satisfy the statutory requirements. 49 U.S.C. App. 2211(a).

2. Petitioners City and County of San Francisco own and operate the San Francisco International Airport through the petitioner Airports Commission. The Commission has applied for and received numerous grants pursuant to agreements under the Airport and Airway Development Act of 1970 and the Airport and Airway Improvement Act of 1982. The agreements included express conditions, in repetition of the statutory requirements, that the airport would be available for "the use and benefit of the public on fair and reasonable terms, and without unjust discrimination" and that it "will not grant or permit any exclusive right" for the use of the airport. C.A. R. E. 1. In May 1986, the Commission submitted a grant application for fiscal year 1986 to fund certain construction and repair projects at the airport.

The eligibility of the Commission to receive a grant was called into question, however, by the airport's denial, in October 1985, of Burlington's application to operate its air courier and cargo service from the airport. Burlington sought authority to add 520 operations (10 takeoffs and landings per week) to the nearly 450,000 operations at the airport in 1987. Burlington proposed to operate those flights with Boeing Q707 aircraft, which are Model 707-300C aircraft that have been retrofitted with a "hush kit" to meet the Stage 2 requirements of the FAA's noise standards. See 14 C.F.R. Pts. 36, 91.

The Commission denied authority to Burlington on the ground that operation of the Q707 would vio-

late the Commission's 1978 noise regulation, Resolution 78-0131. Gov't C.A. Supp. R. E. 10-11. The airport director read the 1978 regulation to bar aircraft that had not achieved Stage 2 certification by January 1, 1985, and that had not been actually operated at the airport by that date. Gov't C.A. Supp. R. E. 10. The Q707, although it met the criteria for Stage 2, had not been certificated by the FAA until after that date.[2]

Burlington pursued the matter by applying to the Commission for a variance from the Airport Director's ruling. While that application was pending, the Director issued Airport Operations Bulletin 85-07-AOB, which in effect provided that no waivers would be given for aircraft that relied on tradeoffs or cutbacks to meet Stage 2 criteria. Gov't C.A. Supp. R. E. 22-23. During this time period, the FAA on

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[2] The director also rejected the application because the Q707 had qualified for a Stage 2 certification by reliance on the thrust cutback and tradeoff procedures of the FAA standard. Gov't C.A. Supp. R. E. 11. In addition, he asserted that the Q707 would be louder during takeoff than any other aircraft operating at the airport. Gov't C.A. Supp. R. E. 11. Finally, the director suggested that allowing the Q707 to operate at the airport would cause the airport to be in violation of its operating license granted by the California State Department of Transportation. Gov't C.A. Supp. R. E. 11. Under Cal. Pub. Util. Code §§ 21002 *et seq.* (West 1965 & Supp. 1992), the State of California asserts authority to regulate the operation of airports and requires the operators to meet stringent noise level limitations. Airports such as San Francisco International operate under variances from those limits, which permit excess noise under certain conditions. In the case of San Francisco, one such condition required it to avoid increasing the overall noise impact in the surrounding areas. C.A. R. E. 22.

several occasions warned the Commission that exclusion of some Stage 2 aircraft while allowing others to operate could constitute a violation of the statutory and contractual duty to operate the airport in a fair and nondiscriminatory manner. Gov't C.A. Supp. R. E. 12, 13-17, 18-21, 24-35. The FAA pointed out to the Commission that other aircraft then operating at the airport had been certified as meeting Stage 2 criteria on the same basis as the Q707, *i.e.*, through the use of cutbacks and tradeoffs. Gov't C.A. Supp. R. E. 12, 13-17, 24-25, 29. The FAA also informed the Commission that there were several models of Stage 2 aircraft permitted to use the airport that were in fact as noisy as the Q707. Gov't C.A. Supp. R. E. 18, 29.

After conducting a public hearing in which the parties were allowed to make oral presentations, the Commission again denied permission to operate the Q707. In Resolution No. 86-0073, the Commission identified the principal basis for its decision: "without the use of a thrust cutback, the Q707 is significantly louder in takeoff mode than any other aircraft permitted to operate at SFIA since January 1, 1985." C.A. R. E. 20.

On January 22, 1988, the Commission adopted a new noise regulation, Resolution No. 88-0016, that replaced the 1978 noise reguiation. Section 4(A) of the 1988 regulation, however, continued to allow Stage 2 aircraft to operate at the airport *only* if they are of a type that was operating at the airport on January 1, 1985. C.A. R. E. 33. The new regulation therefore continued to exclude the Q707 on the same basis as the old.

Other provisions of the Commission's 1988 noise regulation impose gradually more stringent limitations on the operators of those Stage 2 aircraft that

remain eligible to use the airport. By January 1, 1989, such operators were required to use Stage 3 equipment for 25% of their operations at the airport; that requirement increases to 50% by January 1, 1994, to 75% by January 1, 1999, and to 100% by an as yet undetermined date. C.A. R. E. 33-34. Operators of Stage 2 aircraft on international flights, however, are completely exempted if they have no more than two scheduled flights per day. C.A. R. E. 34.

3. Burlington's exclusion prompted it to file a complaint with FAA pursuant to 14 C.F.R. 13.5. FAA undertook an investigation and on July 7, 1986, began an adjudicatory proceeding by issuing a Notice of Proposed Cease and Desist Order to the Commission. Gov't C.A. Supp. R. E. 1-9. The Notice charged that the Commission was in violation of the Federal Aviation Act and the assurances in the grant agreements executed under the Airport and Airway Improvement Act of 1982 and the Airport and Airway Development Act of 1970. Gov't C.A. Supp. R. E. 7-8. As a remedy, the agency proposed to issue a cease and desist order and to declare the Commission in default of the grant agreements, and stated that "no further FAA grants to the City and County of San Francisco will be made" pending completion of the administrative adjudication. Gov't C.A. Supp. R. E. 8.

After a seven-day evidentiary hearing, the administrative law judge issued an initial decision ruling that the Commission's exclusion of the Q707 was unreasonable, arbitrary, and unjustly discriminatory. Pet. App. 77a-87a. That ruling was based on several factual findings. The ALJ first concluded, contrary to the belief expressed by petitioners, that the Q707

would *not* be the noisiest aircraft operating at the airport. *Id.* at 65a-71a. Several models of the Boeing 747 and of the Boeing 727 were noisier or equally noisy a takeoff. *Ibid.* Six of those models had actually been operated at the airport since January 1, 1985, and any operator had the right to begin or continue an unrestricted number of operations with such aircraft. *Id.* at 68a.[3] The ALJ also rejected the contention that the Q707 would be louder because pilots are not required to use the "thrust cutback" procedure by which the Q707 was certified as complying with Stage 2 noise levels. That fact was immaterial, the ALJ concluded, because it was equally true of the other aircraft types found to be noisier than the Q707. *Ibid.* In short, the facts as found by the ALJ —and not presently disputed—established that the Q707 meets the same Stage 2 criteria applied to other aircraft operating at the airport and is less noisy than 15 of those models, which can be operated in unrestricted numbers.

The ALJ also rejected each of the Commission's defenses. The Commission, having abandoned its contention that the Q707 was noisier than the other planes operating at the airport, maintained as an alternative that its action could be sustained because the Commission had a "rational belief" that excluding the Q707 would reduce the airport's risk of liability for noise and would improve the surrounding environment. The ALJ concluded, however, that no

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[3] Other data established similar results with regard to the other two measures of noise used to classify aircraft. For sideline noise, there were 14 noisier models than the Q707, and for approach noise, there were 43 noisier models. Pet. App. 68a n.5.

case dealing with the limitations on a proprietor's power to regulate noise had ever adopted such a deferential and subjective test, but the cases had instead analyzed the actual effect of the proprietor's action in order to determine if it was arbitrary, unreasonable, and discriminatory. Pet. App. 75a-79a. In other words, the proper test is whether the distinctions drawn by the proprietor had a rational basis in fact.

The ALJ concluded that the exclusion of the Q707 would not achieve the Commission's putative purpose of reducing the risk of liability for noise impacts because the Commission allowed noisier airplanes to operate at the airport. The Commission had not shown that there was any likelihood that the addition of the Q707 under such circumstances would increase the likelihood of Commission liability for noise impacts to neighboring property owners. Pet. App. 77a-78a. Similarly, even if the Commission were forced to allow other Q707's to operate, barring the Q707 while allowing operators to use 15 other noisier aircraft, and to increase their operations with such aircraft, would not improve the environment surrounding the airport. *Id.* at 78a.

The ALJ also rejected the contention that the Commission was free to "grandfather" certain aircraft and to regulate the noise impacts "one step at a time." He found that the concept of "grandfathering" did not correctly describe the effect of the Commission's regulation since the regulation did not limit the level of operations or flights by a qualifying class of aircraft. To the contrary, any operator was free to use the noisier aircraft and to expand such operations at will. Pet. App. 82a. The ALJ also concluded that any prerogative the Commission might have to deal with its noise problem incrementally could not

be turned into a license to exclude aircraft on an arbitrary and discriminatory basis. *Id.* at 81a-82a.

In the alternative, the ALJ found the Commission's claim of a "rational belief" to be without any foundation. He rejected the Commission's claim that it was not aware of the true noise characteristics of the Q707 until the adjudicatory hearing.[4] He noted that "the Commission essentially disregarded FAA's assurances as to the noise levels of the Q707" and instead "elected to act on the basis of its own noise evaluations." Pet. App. 87a. He ruled that the Commission's "belief that [secondary] sources were entitled to greater credence than FAA's data and advice was not rational." *Ibid.* Such unreasoning skepticism could not constitute a "rational belief" that barring the Q707 would contribute to the Commission's goals. *Id.* at 84a-87a.

The ALJ also rejected petitioners' argument that the adoption of the 1988 noise regulation should change the outcome of this case. First, the ALJ determined that Section 4(A) of the new regulation continued without change the threshold barrier to the entry of the Q707, *i.e.*, this aircraft, although Stage 2 certified, was not of a type that had been operating

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[4] The most generous view of the Commission's claim was that it did not have access to the raw data underlying the FAA's certification, some of which were confidential proprietary information. The ALJ found that all parties—including the Commission—had failed to make data available. In particular, the Commission did not "disclose all of the bases for its conclusions or everything that its experts told it," nor did it "pursue various offers by Burlington, to elaborate on the limited data which Burlington had provided." Pet. App. 86a n.14. Accordingly, "[n]o party * * * bears any greater responsibility than the others for the Commission's lack of information on the true noise level of the Q707 at full power and maximum takeoff weight in 1985 and 1986." *Ibid.*

at the airport on January 1, 1985. Pet. App. 87a-90a. The ALJ further observed that the discrimination against the Q707 and in favor of other noisier Stage 2 aircraft will continue until at least 1999, as those aircraft may continue to be used, or may begin operations, before that date under certain conditions. *Id.* at 89a-90a.[5]

On the basis of the finding that the Commission had violated the assurances contained in its grant agreements, the ALJ granted the remedy of withholding funds due under grants entered into under the Airport and Airway Development Act of 1970. Pet. App. 92a-96a.[6]

4. All parties took appeals to the Administrator of FAA, who reached a final decision on December 12, 1988, affirming in most respects the decision of the

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[5] The ALJ also concluded that the decision of Burlington not to seek a variance under the new regulation did not bar the granting of relief to the FAA in this proceeding. The ALJ found no indication that the Commission was any more likely to waive the threshold requirement than it had been in the past. Pet. App. 90a.

[6] In accordance with an earlier ruling that he had no jurisdiction over the administration of grants under the later legislation, the Airport and Airway Improvement Act of 1982, the ALJ declined to rule on the appropriateness of withholding approval of applications pending under that statute. Pet. App. 95a. The Administrator of FAA later determined that the ALJ did have jurisdiction to rule on charges concerning grants under the 1982 Act. *Id.* at 34a-35a. The Administrator ruled, however, that the ALJ's error did not require a remand or reconsideration, because the remedy for violation of the grant assurances under the 1970 Act would in any case be to approve the decision of the FAA to withhold further funding—including funding for pending applications under the 1982 Act—until the default is cured. *Id.* at 35a-36a.

ALJ. The Administrator rejected petitioners' claim that the Commission's conduct could be excused because it was compelled by the California State Department of Transportation to bar the Q707 in order to avoid violating the state noise variance. The Administrator found no evidence that admission of the Q707 would be inconsistent with the terms of the variance. Pet. App. 38a & n.10. Moreover, even if the State attempted to require the Commission to bar the Q707, the Administrator declared such an effort would be preempted by federal law, citing *San Diego Unified Port District* v. *Gianturco*, 651 F.2d 1306 (9th Cir. 1981), cert. denied, 455 U.S. 1000 (1982). Consequently, petitioners had failed to establish the defense of discharge because of an impossibility of performance. Pet. App. 39a.

On the merits, the Administrator noted that petitioners had conceded the validity of the ALJ's findings regarding the relative noise levels of the Q707 and other Stage 2 aircraft permitted to operate at the airport. Pet. App. 47a & n.16. The Administrator rejected the Commission's reliance on the "rational belief" test for evaluating its actions in barring the Q707. Rather, the ALJ had properly concluded that he should determine whether in fact the exclusion of the Q707 was unreasonable, arbitrary, or unjustly discriminatory. *Id.* at 50a-52a.

The Administrator noted that the ALJ had correctly found that the Commission excluded the Q707 under the 1978 noise regulation because it had not been retrofitted prior to January 1, 1985, and that the Commission continued to exclude the Q707 under the 1988 regulation because it had not been operating at the airport on January 1, 1985. The Administrator declared "[e]xclusion of the Q707 based on the date of modification, rather than the date of comply-

ing operation is neither rational nor reasonable. The date of retrofit is irrelevant to the amount of noise an aircraft emits." Pet. App. 52a.

The Administrator further affirmed the ALJ's determination that the asserted bases for denying a waiver for the Q707 were arbitrary and unreasonable. The Administrator determined that it was unreasonable to rely on the fact that the Q707 used tradeoffs and cutbacks to achieve Stage 2 certification. Pet. App. 52a-53a. Moreover, as found by the ALJ, the comparison of the noise characteristics of the Q707 with other Stage 2 aircraft allowed to operate at the airport demonstrated beyond peradventure that the exclusion of the Q707 was unjustly discriminatory. *Id.* at 53a. Finally, the Administrator rejected the Commission's reliance on the "grandfather" and "ratcheting down" theories of its conduct as plainly inapplicable to these circumstances. *Id.* at 53a-54a.

Accordingly, the Administrator concluded that the record fully supported the ALJ's determination that the application of both the 1978 noise regulation and the 1988 noise regulation was unjustly discriminatory and therefore in violation of the grant assurances given under the Airport and Airway Development Act of 1970. Pet. App. 54a-55a. Because of the finding that the Commission had engaged, and was continuing to engage, in unjust discrimination in excluding the Q707, the FAA could not be satisfied, as required by the statute, that the Commission could give assurances that the airport would be operated on "fair and reasonable terms and without unjust discrimination." 49 U.S.C. App. 2210(a). Therefore, the Administrator approved the FAA's decision to withold approval of grant applications until this default is cured. Pet. App. 55a-56a. The Commission

filed a petition for reconsideration, which was denied on October 2, 1989. C.A. R. E. 64-73.

5. On direct review under 49 U.S.C. App. 1486, the court of appeals affirmed. Pet. App. 1a-24a. The court found that the agency had arrived at its factual conclusions concerning the relative noise levels of the aircraft used at the airport on the basis of "substantial evidence." *Id.* at 13a-14a. The court granted substantial deference to the FAA's view that excluding the Q707 on a basis that had no bearing on noise (date of retrofit and operation), while permitting noisier aircraft to use the airport, constituted unjust discrimination. *Id.* at 12a-16a.

The court rejected the Commission's claim that its regulation must be upheld because it was based on a "rational belief" that it would decrease noise by eliminating a noisy aircraft. Pet. App. 15a n.5. The court of appeals sustained the FAA's holding that a proprietor's "rational belief" is not the standard for measuring compliance with the grant agreement or the statute, and that the proprietor did not in any event have such a belief. *Ibid.* The court further denied petitioners' claim that the regulation was simply an exercise in permissible grandfathering; the court pointed out that the regulation grandfathered classes of planes, not individual aircraft, and was therefore not truly grandfathering. *Id.* at 17a-18a. The court also rejected petitioners' suggestion that the airport could not meet its federal grant obligations and satisfy state law requirements to reduce noise. *Id.* at 18a-19a. Finally, the court held that the airport's 1988 noise regulation continues to discriminate against the Q707; there was consequently no need for Burlington or the FAA to engage in another round of administrative review. *Id.* at 19a-20a.

The court of appeals held, however, that the 1987 amendments to the Airport and Airways Improve-

ment Act requiring FAA to complete consideration of grant requests, including a hearing, within 180 days applied to two grant requests filed by the airport. Pet. App. 20a-22a. Consequently, the court directed the FAA to approve the 1986 and 1987 requests. The court nevertheless approved the FAA's refusal to process any grant requests for succeeding years until the airport corrects its default. *Id.* at 22a.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. No constitutional issue is presented, and the importance of any question of federal statutory interpretation has been substantially diminished by congressional enactments subsequent to the actions at issue in this case. Further review is thus not warranted.

1. Petitioners do not attack the correctness of the agency's conclusion that petitioners discriminated by excluding the Q707. Nor do they challenge the conclusion that the Q707 is as quiet as or quieter than other aircraft permitted unrestricted access to the airport under their noise regulation. Instead, although the court of appeals made no finding on this issue, they seek (Pet. 17-23) a ruling from this Court that the federal government may not undertake independent fact-finding to determine whether its grant agreements and federal law have been violated. In the name of federalism, petitioners urge that when the United States considers whether a municipal government has breached a grant agreement with the federal government, the United States is bound by whatever factual findings and legal conclusions have been developed by the municipality. If petitioners are correct, the United States would be barred from in-

vestigating and determining the validity of any breach of law where the muncipality has concluded its conduct was validly undertaken. Here, petitioners would bind FAA to ignore, for purposes of enforcing its grant agreements, FAA's own conclusions as to the noise levels of different aircraft, because the grant recipient chose to reach its own conclusions in disregard of FAA's expertise in the area.

Petitioners misconceive the Administrator's substantive and procedural obligations under federal law. The Federal Aviation Administration is charged with implementing the airport grant program. The Act imposes on the federal government the obligation to ensure that federal funds are dispensed only to grant recipients who do not unjustly discriminate. 49 U.S.C. App. 2210(a)(1). The Administrator interpreted the statute's "unjust discrimination" provision to forbid discrimination among types of aircraft on the basis of noise where the aircraft do not exhibit different noise characteristics. He then found, on the basis of substantial evidence (Pet. App. 14a), that petitioners had used their regulation to exclude aircraft that were less noisy than some and equally noisy as other aircraft that petitioners had permitted to use the airport on an unrestricted basis. The correctness of those facts is not now in dispute, and there is no reason why the Administrator should not have relied on those facts in determining that petitioners had violated the "unjust discrimination" requirement.

Nothing in the Constitution or this Court's decisions suggests that the Administrator acted improperly. Petitioners complain that they never received "clear and unambiguous notice" that their administrative processes would not bind the federal government. But petitioners indulge in a peculiar presumption. It would be unusual indeed for the federal gov-

ernment, in the exercise of its statutory responsibilities to oversee compliance with grant obligations and federal law, to be bound by findings of its grantee. None of the cases petitioners cite stands for that proposition.[7]

The decisions of this Court cited by petitioners (Pet. 20) do not establish any rule of preclusion in cases, such as this one, in which a municipal agency is acting in a non-adjudicatory role. Here, the Commission—not an independent hearing officer—presided at a public hearing. No participant could cross-examine those who testified, and there was no opportunity prior to the hearing to obtain expert witness testimony for the purpose of rebutting it. Two of the Commissioners expressed the view that claims of discrimination were entirely irrelevant to their proceedings. Admin. R. Doc. 3, Answer of Airport Commission, June 24, 1986, Exh. E (Tr. of Mar. 18, 1986 public hearing) at 27, 31.

In addition, the United States did not participate as a party in any of petitioners' proceedings.[8] This

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[7] *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), held that a federal grant program would not be assumed to have imposed "massive financial obligations" on the States absent a clear statement to that effect. *Id.* at 16-17. Neither *Pennhurst* nor any of the other cases petitioners cite (Pet. 19-20) suggests that the federal government may not independently review and determine, subject to review in the federal courts, a grant recipient's eligibility for funding.

[8] Petitioners state (Pet. 7) that "[t]he FAA made a written submission over the signature of the FAA Chief Counsel and FAA representatives were present at the [Airports Commission] hearing [concerning Burlington's waiver application]." Burlington supplied the Commission with some materials from FAA and some FAA representatives attended the hearing, along with other members of the public. Nonetheless, FAA was not itself a party to the proceedings and took no

Court's cases require, at a minimum, that the parties to state court or administrative proceedings be the same before giving those proceedings preclusive effect in a subsequent federal proceeding. See *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966); *University of Tennessee* v. *Elliott*, 478 U.S. 788, 797-799 & n.8 (1986) (issue and claim preclusion may prevent relitigation between same parties where state courts give adjudicatory administrative proceedings preclusive effect).[9]

2. The decisions of the courts of appeals are not in conflict on any of the issues decided below. The court of appeals here sustained the Administrator's reasonable interpretation of the statutory mandate to limit funding to airports that do not unjustly discriminate. None of the many cases petitioners cite (Pet. 23-26) concerns a federal agency's determination that an agency grantee has violated its obligations under a grant program. Petitioners cite (Pet. 23-26) only actions by private parties against municipal airport proprietors, raising direct challenges to noise limitations under the Supremacy Clause, the Commerce Clause, and the Equal Protection Clause.[10]

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action that would suggest that it considered itself to be—or should be held to be—bound by the result.

[9] Petitioners rely (Pet. 20) on a series of this Court's abstention cases. None of the features that make abstention appropriate—a pending or imminent state proceeding or an attempt to commence suit in federal court to enjoin or otherwise interfere with that proceeding—are present in this case. Indeed, the Commission's proceedings had already been completed when FAA began its adjudication.

[10] Petitioners' contention (Pet. 27-28) that the Commission's action must be sustained so long as it does not violate the Equal Protection Clause is mistaken. The issue in this case is not whether the Commission's actions constituted dis-

None of those cases purports to resolve how the Administrator, in the context of his own administrative process, must choose a standard for enforcing the terms of grant contracts. As the Ninth Circuit itself points out, "[w]hether the FAA is required to approve of a local noise regulation is a different question from whether the regulation is constitutional." *Alaska Airlines, Inc.* v. *City of Long Beach*, 951 F.2d 977, 982-983 n.2 (9th Cir. 1991). Consequently, even if the lower courts have established somewhat differing standards for evaluating direct challenges to airport noise regulations, this case does not raise any question concerning such challenges.

Moreover, any tension among the cases cited by petitioners is far less serious than petitioners represent (Pet. 24). The reasoning of the Ninth Circuit in this case is entirely consistent with the holding of the Second Circuit in *British Airways Bd.* v. *Port Authority*, 564 F.2d 1002 (1977), that an airport proprietor may not bar access to an air carrier on the basis of unreasoned skepticism concerning the noise level of an aircraft used by the carrier, in the face of substantial evidence to the contrary provided by the FAA. 564 F.2d at 1011-1012. See also *British Airways Bd.* v. *Port Authority*, 558 F.2d 75, 83-84 (2d Cir. 1977) (local noise regulation by airport proprietor must be reasonable, non-arbitrary, and non-discriminatory).[11] The court of appeals below

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crimination in violation of the Equal Protection Clause. Rather, it is whether the Commission's actions barring Burlington's aircraft are unjustly or reasonably discriminatory, as those terms are used in federal statutes and regulations and the Commission's grant agreements.

[11] Nor does *Global Int'l Airways Corp.* v. *Port Authority*, 727 F.2d 246, 251 (2d Cir. 1984), or *Western Air Lines* v. *Port Authority*, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485

similarly held that unreasoned skepticism of FAA noise data will not sustain a discriminatory regulation, both because a "rational belief" that the FAA's noise data are erroneous would be insufficient to sustain the regulation, and because, in any event, petitioners' belief that the FAA data were mistaken was not reasonable.

Petitioners further overstate the holdings of the Ninth Circuit in *Santa Monica Airport Ass'n* v. *City of Santa Monica*, 659 F.2d 100, 104 n.5 (1981), and *Alaska Airlines, Inc.* v. *City of Long Beach*, 951 F.2d 977 (1991). Even if an intracircuit conflict would warrant further review by this Court, *Santa Monica* did not hold (Pet. 26) that a municipal proprietor's noise regulation was immune to challenge so long as it had a "rational belief" that the regulation would advance the municipality's goals. Indeed, the passage cited by petitioners simply rejected the argument that the legitimate interests of the proprietor were limited to avoiding liability for taking property without just compensation.

U.S. 1006 (1988), establish a relaxed standard for reviewing the impact of a local noise regulation. The Second Circuit in *Global Airways* simply rejected a facial challenge to a noise regulation for lack of an adequate record. In that case, 727 F.2d at 252, and a subsequent one on the same matter, *Global Int'l Airways Corp.* v. *Port Authority*, 731 F.2d 127 (2d Cir. 1984), the court of appeals made clear that its holding was limited to the question whether the record was sufficient to establish facial preemption of the regulation. The court did not decide, and "had no factual basis for deciding, whether the Rule, as applied, creates an unlawful discrimination." 731 F.2d at 130 n.1. *Western Air Lines* sustained a perimeter rule as a reasonable and nondiscriminatory means of reducing congestion at one of New York's airports. In so holding, the Second Circuit did not depart from the principles of that court's *British Airways* cases.

Finally, *Alaska Airlines*, far from affirming any standard articulated by petitioners, specifically distinguished the court of appeals' decision in this case, noting that even if an airport proprietor's authority to enact noise regulations is not preempted under federal law, that authority is

> not without limits. Airport proprietors who exceed their regulatory authority risk having federal funds withheld by the Federal Aviation Administration. Whether the FAA is required to approve of a local noise regulation is a different question from whether the regulation is constitutional, and the analysis in *City and County of San Francisco*, has no application to this case.

Alaska Airlines, 951 F.2d at 982-983 n.2 (citations omitted).[12]

3. The importance of the issues presented in this case has been diminished by enactment in 1990 of comprehensive federal airport noise legislation. The Airport Noise and Capacity Act of 1990, codified at 49 U.S.C. App. 2151 *et seq.*, mandates a highly focused federal role in resolving noise problems associated with the increasing demand for air travel. The 1990 Act requires the Secretary of Transportation to promulgate a national aviation noise policy, 49 U.S.C. App. 2152(a), including a national program for reviewing new airport noise and access restrictions on Stage 2 and Stage 3 aircraft, 49 U.S.C. App. 2153 (a)(1). The Act imposes direct procedural obligations on an airport operator seeking to implement

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[12] *Alaska Airlines*' dictum that there is no federal preemption of proprietor noise regulations is far too broad a statement. The importance of that error, however, is diminished by the 1990 Airport Noise and Capacity Act, which gives the federal government an explicit reviewing role in much airport noise and access regulation. See pages 23-25, *infra*.

restrictions on Stage 2 aircraft. 49 U.S.C. App. 2153(c).[13] It further requires any airport operator seeking to restrict Stage 3 operations to submit its proposed restriction to the Secretary of Transportation for approval. 49 U.S.C. App. 2153(b) and (d). If the Secretary disapproves a noise regulation under that provision, the United States assumes liability for noise damages, "to the extent that a taking has occurred as a direct result of such disapproval." 49 U.S.C. App. 2155.[14]

Beginning in the year 2000, the Act further prohibits operation of all Stage 2 aircraft over 75,000

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[13] 49 U.S.C. App. 2153(c) provides:

> No airport noise or access restriction shall include a restriction on operations of Stage 2 aircraft, unless the airport operator publishes the proposed noise or access restriction and prepares and makes available for public comment at least 180 days before the effective date of the restriction—
>
> (1) an analysis of the anticipated or actual costs and benefits of the existing or proposed noise or access restriction;
>
> (2) a description of alternative restrictions; and
>
> (3) a description of the alternative measures considered which do not involve aircraft restrictions, and a comparison of the costs and benefits of such alternative measures to the costs and benefits of the proposed noise or access restriction.

[14] The Act further forbids the Secretary to disburse funds under the Airport and Airway Improvement Act of 1982 to any airport not in compliance with the Noise Act. 49 U.S.C. App. 2156. It does not, however, displace the independent requirements of the 1982 Act. Indeed, that Act was also amended in 1990 to endorse expressly the Administrator's longstanding view that the Act "should be administered in a manner consistent with" the goal of"preventing unjust and discriminatory practices, *including as they may be applied between category and class of aircraft.*" 49 U.S.C. App. 2201(a)(5) (emphasis added).

pounds without an express waiver from the Secretary of Transportation and requires the Secretary to promulgate regulations providing for phased-in compliance with this deadline. 49 U.S.C. App. 2157. Those regulations, promulgated in final form in September 1991, forbid—with certain exemptions—addition of Stage 2 aircraft to the air carrier fleet and establish a schedule for phasing out all Stage 2 aircraft. 14 C.F.R. 91.855, 91.865; 56 Fed. Reg. 48,658, 48,659 (1991).

The 1990 Noise Act has dramatically altered the substantive and procedural obligations of airport proprietors, air carriers, and the executive branch. The significance of the decision of the court of appeals is consequently greatly diminished. If noise or access restrictions are to become the subject of this Court's attention, it should be in the context of Congress's new comprehensive plan.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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